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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~[illegible]~~ 63

ALLIED PAINT & COLOR WORKS, INC.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Allied Paint & Color Works, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on August 29, 1962.

Opinion Below

The opinion of the Court of Appeals in this case is reported at 309 F. 2d 133. This opinion is set forth as an Appendix hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on August 29, 1962. On November 19, 1962, Mr. Justice John M. Harlan, granted an order extending the time of petitioner to file its petition for a writ of certiorari to

and including January 26, 1962. The jurisdiction of this Court is invoked under Title 28, United States Code, 1254(1).

Questions Presented

1. Whether petitioner was entitled to a trial before the district court upon its complaint seeking damages based upon issues involving reformation of contracts, a matter beyond the jurisdiction of the Armed Services Board of Contract Appeals, as well as damages for delay.

2. Whether the decision of the Court of Appeals limiting the exercise of the district court's original jurisdiction herein to a judicial review of the record made before the Board of Contract Appeals, without a full trial of those issues before the district court, was proper under the circumstances of this case.

3. Whether this Court should review the conflict of decision between the Court of Appeals for the Second Circuit in this case and the Court of Appeals for the District of Columbia Circuit in *Blake Construction Company* v. *United States*, 296 F. 2d 393, as to the treatment to be given the record made before the Board of Contract Appeals, in the exercise of the original jurisdiction of the Courts over questions of law.

4. Whether this Court should review the conflict of decision between the Court of Appeals for the Second Circuit in this case and the Court of Claims in *Carlo Bianchi and Company Inc.* v. *United States* (No. 466-54), (cert. granted, on petition of the United States, in No. 529, Oct. Term, 1962, on December 17, 1962) as to the proper exercise of the function of judicial review by the

Courts of decisions of the Board of Contract Appeals over questions of fact.

Statutes Involved

Title 28, United States Code

§1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Title 41, United States Code

§321. Limitation on pleading contract provisions relating to finality; standards of review.

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as neces-

sarily to imply bad faith, or is not supported by substantial evidence. (May 11, 1954 ch. 199, §4, 68 Stat. 81)

§322. *Contract—provisions making decisions final on questions of law.*

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. (May 11, 1954 ch. 199, §2, 68 Stat. 81.)

Disputes Article in Government Contracts.

12. Disputes.

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided*, That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision. (Standard Form 32 November 1949 Edition)

STATEMENT OF THE CASE

The Facts

On June 20, 1962, following an invitation for bids, at which petitioner (hereinafter referred to as "contractor") was the lowest responsible bidder, it entered into a contract with the Department of the Navy, No. N383s-77428 (hereinafter referred to as Contract No. 1), under which contractor agreed to furnish 7,644 paint kits to be delivered to various depots within 90 days after the date of the contract. Each kit was to contain a quart can of phosphorescent paint, together with four assorted other quart cans. The contract expressly provided that the phosphorescent paint, totaling 1914 gallons, was to be Government furnished, and that the Government was to deliver them in one gallon cans to contractor's plant within 30 days from the contract date. The contract provided for an extension of time to be granted to contractor for its performance of the contract, if the Government delayed in supplying the Government-furnished property. Although the Government was not to be liable for its delay in the delivery of the phosphorescent paint or for its failure to deliver same, the contract provided for an equitable adjustment in price or time of performance, and this adjustment was to be made at the contractor's written request. Title to this Government-furnished phosphorescent paint was to remain in the Government during the performance of this contract, although the risk of loss was to be assumed by contractor after the delivery of the paint to it. The contract also contained a "disputes" article, whereby the parties agreed that disputes arising under the contract would be de-

cided by the Contracting Officer, with the right to appeal to the Secretary of the Navy or his representative, which in this case was the Armed Services Board of Contract Appeals.

In performing this contract the Government delivered only 3,956 quarts (989 one gallon cans) of the phosphorescent paint. Thereafter the Government furnished no further paint and contractor ceased production under this contract. At that time 240 quarts of this paint (in quart cans) remained at petitioner's plant and were segregated and stored by it until May, 1954, when a fire destroyed the plant and its contents.

On January 7, 1954, contractor and the Department of the Navy entered into a negotiated-type contract, bearing No. N383s-97516 (hereinafter referred to as Contract No. 2). Under this contract contractor agreed to furnish the Government with 3,688 quarts of phosphorescent paint in one quart cans at a price of $6.17 per quart. This contract contained a "Government-furnished property clause," which was different from the one contained in Contract No. 1. The essential difference in this clause was that under Contract No. 2 the risk of loss was placed upon and remained upon the Government. Contract No. 2 provided in essence that the phosphorescent paint was to be "Government furnished material" as follows:

> "The Phosphorescent Paint to be furnished under this contract shall be packaged and marked by the contractor so it may be used, without repacking or remarking, as Component "A" of the Phosphorescent Paint Kits to be furnished by the same contractor under Contract N383s-77428 (which is Contract No. 1)."

Contractor had produced 1,118 quarts of the phosphorescent paint under Contract No. 2, which had been

inspected, accepted and paid for by the Government, and this paint was among the property destroyed in the fire at contractor's plant. Thereafter contractor was instructed by the Contracting Officer to complete the supply of the paint required under Contract No. 2. At the same time the Contracting Officer revived Contract No. 1, under which he had taken no action for more than two years, and directed contractor to complete performance by delivery of the kits required thereunder. At no time prior to the fire at contractor's plant had the Contracting Officer directed contractor to apply any of the paint produced under Contract No. 2 to the performance of Contract No. 1. Contractor completed both contracts and made claim to the Contracting Officer for payment of the destroyed phosphorescent paint, which it had replaced by purchase in the open market.

The Contracting Officer denied contractor's claim and the matter was ultimately presented to the Armed Services Board of Contract Appeals, (ASBCA No. 2564). During the course of the proceedings before the Board contractor established that it interpreted the "Government-furnished property clause" of Contract No. 2 as placing the risk of loss of this paint upon the Government, for which reason it had not purchased insurance covering its risk of loss. Contractor also sought to claim an equitable adjustment in price under Contract No. 1, for the Government's delay of nearly two years in proceeding with said contract and in failing during this period of time to furnish the required phosphorescent paint under said contract. On June 25, 1957, the Board denied contractor's claim, by affirming the decision of the Contracting Officer. This suit followed thereafter in the United States District Court for the Southern District of New York, in which petitioner sought to recover $9,898.06.

The Record

The record in this case before the Court of Appeals consisted of an Appendix filed by petitioner, as well as the certified original record of the district court. This Appendix has been certified and is submitted to this Court for use in its consideration of this case, and nine copies thereof have been filed with this Court for like use. The respondent did not file any separate Appendix before the Court of Appeals, but handed up for that Court's use, a copy of the proceedings before the Armed Services Board of Contract Appeals.

Proceedings Below

In its complaint petitioner claimed judgment against respondent in the amount of $9,898.06. This claim included $6,898.06 for the payment of 1,118 quarts of phosphorescent paint which petitioner purchased in the open market in order to complete Contract No. 1, and $3,000.00 damages for the Government's delay in delivering the phosphorescent paint required for the completion of Contract No. 1. In its answer respondent stated, in essence, that the administrative decision of the Board of Contract Appeals barred petitioner from relief. Respondent also alleged that petitioner was barred from any relief for the Government's delay in proceeding under Contract No. 1 by reason of petitioner's alleged failure to comply with contract procedures.

After issue was joined in this action, petitioner filed a note of issue and statement of readiness placing this case upon the non-jury trial calendar of the district court, on May 1, 1959. No objection was raised by respondent to the filing of the note of issue. Thereafter on October 4,

1960, at a pre-trial conference, in the district court, respondent moved orally for an order precluding the taking of testimony and directing that the scope of judicial review be limited to a consideration of the record of proceedings before the Board of Contract Appeals and to the determination as to whether the decision of the Board "was supported by substantial evidence". This motion was later renewed in written form, and it was submitted to the Court. On October 24, 1960, the district judge filed a memorandum opinion in which he held that there was only one legal issue to be considered: "When the paint was accepted by the Government inspector, did it become 'government furnished property' under the first contract". This issue was ordered to be determined solely on the record before the Board of Contract Appeals, without a trial before the Court.

Thereafter on July 6, 1961, the district judge filed an opinion holding that the risk of loss of the paint was on the petitioner under the terms of the first contract, and he thereupon dismissed petitioner's compiaint.

Reasons for Granting the Writ

The principal reason for granting the writ of certiorari in this case is to resolve the conflict between the decision of the Court of Appeals for the Second Circuit in this case, and the decision of the Court of Appeals for the District of Columbia Circuit in *Blake Construction Company* v. *United States*, 296 F. 2d 393 (as to which the Government did not seek review in this Court), as well as the conflict between the decision in this case and the decision of the Court of Claims in *Carlo Bianchi and Company Inc.* v. *United States* (No. 466-54). This Court granted the Government's petition for a writ of certiorari

on December 17, 1962 in the *Bianchi* case (No. 529, Oct. Term, 1962), upon the Government's assertion of the conflict between these two decisions.

1. In *Blake Construction*, the Court of Appeals refused to be bound by the record made before the Board of Contract Appeals, in deciding questions of law and equity involving the reformation of a contract. The issues before the court related to such questions of law and equity, and arose out of the interpretation of a construction contract which did not contain a provision for renegotiation. The Government contended that the renegotiation provision had been inadvertently omitted from the contract, and was sustained in that argument by the Board of Contract Appeals. The Government then brought suit to recover the renegotiated amount found by the Board. Summary judgment on the basis of the Board record was granted to the Government by the district court. On appeal, the Court of Appeals reversed, stating:

> "We hold that whether grounds for reformation of a contract exist is a question for a United States court on evidence adduced before it and not to be determined on the record made before the Board of Review in the executive branch" (296 F. 2d 393, 397).

No further review of this decision was sought by the Government in this Court.

In the case at bar, the district court reformed the contract by declaring that the 7-page typewritten clause governing "Government-furnished property" of Contract No. 2 was surplusage and was to be disregarded. The Court of Appeals held that evidence as to the intention of the parties concerning that clause should have been

presented by the contractor to the Board. The Court stated:

> "Appellant should have presented all its evidence to the administrative board. If it had done so, the evidence would have been available both to the administrative tribunal and to the district court. Since the parties had proceeded through a full hearing before the Board of Contract Appeals, the district court was quite correct, under the circumstances here presented in limiting its review to the record made before the administrative board" (309 F. 2d 133, 138).

Both Courts of Appeals held that the courts were exercising their original jurisdiction over question of law and equity. Nevertheless each gave different substantive treatment to the finality of the proceedings and records of the Boards.

Since the Board of Contract Appeals has often held that it has no jurisdiction to reform contracts,[1] the fact that petitioner did not submit evidence to it as to the intention of the parties relating to the "Government-furnished property clause", should not act to preclude such evidence at a trial in the district court. Where, as here, the questions before the Courts were questions of law and equity, petitioner need not have sought review by the Board, but could have proceeded directly to court. *Bell Aircraft Corp.* v. *United States*, 120 Ct. Cl. 398, 100 F. Supp. 661, affirmed by equally divided court, 344 U. S. 860; *Atlantic Carriers Inc.* v. *United States*, 131 F. Supp. 4 (D.C. S. D. N. Y., I.R. Kaufman, D.J.); *Pfotzer*

1. *Appeal of Windsor Locks Paper Co.*, ASBCA 3317; *Appeal of Electronic Measurements Co. Inc.*, ASBCA 1433; *Appeal of Windsor Manufacturing Co.*, ASBCA 666; *Appeal of Wilson Bag and Burlap Co.*, ASBCA 586.

v. *United* States (Ct. Cl.) 77 F. Supp. 390. On the issues in these cases the Board records were neither mandatory nor required. In the *Blake Construction* case, *supra*, the Court of Appeals for the District of Columbia Circuit so held, refusing to accept the record of the Board as a basis for summary judgment. In this case, the Court of Appeals for the Second Circuit held the Board record binding and immutable upon the courts. This fundamental conflict in principle should be resolved by this Court.

Moreover, the Board record, to which the Court of Appeals in this case paid such deference, is a record which is not made under conditions prescribed by the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*); nor is it made under generally accepted principles of administrative or judicial procedures. *Volentine & Littleton* v. *United States*, 136 Ct. Cl. 638, 145 F. Supp. 952; *Fehlhaber Corp.* v. *United States*, 138 Ct. Cl. 571, 151 F. Supp. 817, cert. den. 344 U. S. 877.

The treatment of such record as an "administrative record" and the characterization of the Board of Contract Appeals as an "administrative board", by the Court of Appeals in this case, has the effect of clothing both with a status and character to which neither are entitled under generally accepted rules and principles of administrative law. Actually the Board is merely the representative of the executive department head, designated to decide contract disputes under a procedure over which the contractor has no freedom of contract and no choice of tribunal or procedure. The entire concept of the propriety of holding records made pursuant to such procedures to be binding on the courts for the determination of questions of law and equity, as well as questions of fact, should be

reviewed by this Court. The finality to be afforded the Board decision and record as to questions of fact is at issue in the *Bianchi* case, *supra*. In this case the Court is asked to decide as well the finality to be afforded the Board record in the resolution of questions of law and equity.

2. In its petition for a writ of certiorari in the *Bianchi* case, the Government relied principally upon the decision of the Court of Appeals in this case for its assertion of a conflict of decision. (See pp. 8-9, 88-100, petition, No. 529, Oct. Term, 1962.) The Government argued that since a contractor has had the opportunity to make a record before the "administrative board" appointed to decide contract disputes, a contractor should not be permitted to have a "trial *de novo*" of such claim before the Court of Claims, especially where he would not also receive such a trial in contract disputes brought in the district courts. The Government would thus limit court proceedings in contract disputes to a "sufficient evidence" review of the so-called "administrative record" made before the board. This court, having granted the Government's petition for a writ of certiorari in the *Bianchi* case, undoubtedly considers this conflict in decisions to be of great importance in the administration of government-contract disputes, requiring its definitive resolution of the problem.

The case at bar is exemplary of the situation in which the contractor has had no opportunity to make a record on the issues presented. The Board had no jurisdiction over questions of reformation of contract. No evidence was there introduced to prove that the "Government-furnished property" clause of Contract No. 2 constituted a reformation of the "Government-furnished property"

clause of Contract No. 1. Such evidence, properly admissible at the court trial, would have included both memoranda and witnesses of the Government concerning the negotiation of Contract No. 2, and the discussions that ensued prior to the execution of that contract. This evidence would have demonstrated the intention of the parties regarding that clause.

The Court of Appeals, in its opinion, without evidentiary basis, held that the Government-furnished property clause included in Contract No. 2 was a "standard" clause, about which the parties expressed no intention. The fact of the matter is the Government-furnished property clause is not a "standard" clause always used, but in its standard form is used "where applicable". See 32 CFR 7-104.7-104.24; 13.502. Nothing was to be furnished by the Government in the nature of facilities, equipment or material to support the performance of Contract No. 2, yet a 7-page typewritten Government-furnished property clause was incorporated therein. It ill behooves a court to declare such clause as "surplusage", or another court to declare it to be a "standard" inclusion, without evidence on these questions. It cannot be denied that the inclusion of this clause must have had some meaning to the contracting parties. The treatment given to it by the courts below in this case, in light of the lack of evidence in the Board record on this question, is demonstrative of the lack of petitioner's opportunity to have any hearing or trial on these vital issues.

3. From the foregoing it is quite apparent that there are two separate lines of cases determining the finality of contract board decisions. The Court of Claims has consistently held that in proper circumstances it will grant its

plaintiffs a full trial on the merits of their claims without regard to prior proceedings before the contract board. In support of this position the court below wrote as follows in *Valentine & Littleton* v. *United States*, *supra*:

> "But the so-called 'administrative record' is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for any procedure in making them. The head of the department may make the decision on appeal personally or may entrust anyone else to make it for him. Whoever makes it has no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents. There may or may not be a transcript of the oral testimony. The deciding officer may, and even in the departments maintaining the most formal procedures, does, search out and consult other documents which, it occurs to him, would be enlightening, and without regard to the presence or absence of the claimant."

Courts of Appeals and district courts have tended to take a different view and to treat contract board proceedings with the status of proceedings before administrative agencies, governed by the formalities required under the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*). The Court of Appeals for the District of Columbia Circuit has refused to follow this trend and its approach is exemplified by its decision in the *Blake Construction* case, *supra*. In its opinion in this case, the Court of Appeals for the Second Circuit has recognized the need for resolution of this divergence of decision among the courts, in language which clearly sought guidance for the future. See e.g., 309 F. 2d 133, 137-138, pp. 10a-11a, *infra*.

CONCLUSION

For all of the foregoing reasons this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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DANIEL H. GREENBERG,
Of Counsel.

January 22, 1963.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 202—September Term, 1961.

(Argued February 6, 1962 Decided August 29, 1962.)

Docket No. 27236

ALLIED PAINT & COLOR WORKS, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before—LUMBARD, *Chief Judge*, and SWAN and WATERMAN, *Circuit Judges*.

Appellant seeks reversal of an order entered in the United States District Court for the Southern District of New York, MacMahon, *J.*, dismissing appellant's complaint that alleged a breach of contract by the United States, and seeks reversal of an earlier order limiting trial in the district court to the record made before the Armed Services Board of Contract Appeals. Affirmed.

LEWIS, MACDONALD & VARIAN (Robert D. Witte, Maurice J. Gilchrist, of counsel), New York City, *for Plaintiff-Appellant.*

WILLIAM H. ORRICK, JR., Asst. Atty. Gen., Robert Morgenthau, U. S. Atty., S. D. N. Y., John G. Laughlin, John C. Eldridge, Attys., Dept. of Justice, Washington, D. C., *for Defendant-Appellee.*

WATERMAN, *Circuit Judge*:

Appellant, a paint contractor, brought the present action against the United States in the U. S. District Court for the Southern District of New York for breach of contract, alleging that the Government failed to deliver a certain quantity of phosphorescent paint which it was the Government's duty to furnish under the contract. This is an appeal from the order of the district court dismissing appellant's complaint. We affirm the court below.

On June 20, 1952, following an invitation to bid, appellant and the Government entered into contract No. N383s-77428 (hereinafter referred to as contract No. 1), under which appellant agreed to furnish the Government 7,644 paint kits to be delivered to various government depots within 90 days after the date of the contract. Each kit was to contain a quart can of phosphorescent paint, which was called component "A," a quart can of white primer, a quart can of thinner, and a quart can of varnish. The contract expressly provided that the 7,644 quarts of phosphorescent paint, totalling 1,911 gallons, were to be Government-furnished, and the Government was to deliver them in one gallon cans to appellant's plant within 30 days from the contract date.

Contract No. 1 then provided that upon request by appellant the dates for appellant's performance would be extended if the Government delayed in supplying the Government-furnished property, and though the Government

would not be liable for delays in the delivery of the phosphorescent paint or for failure to deliver, an equitable adjustment in the performance date or the price would be made upon the written request of the contractor. The contract also provided that the Government could increase or decrease the amount of property it was to furnish, and in such event, there was provision for price or date adjustments. Although title to the phosphorescent paint remained in the Government, appellant agreed to assume the risk of loss after the property was delivered by the Government. The contract stated that:

> [T]he Contractor, upon delivery to it of any Government-furnished property, assumes the risk of, and shall be responsible for, any loss thereof or damage thereto except for reasonable wear and tear . . .

The contract also contained a "Disputes" clause, whereby the parties agreed that disputes arising under the contract should be settled by the Contracting Officer, with the right of appeal to the Secretary of Defense or his representative, i.e., the Armed Services Board of Contract Appeals.

Under Contract No. 1 the Government was able to deliver to appellant only 3,956 quarts (989 one gallon cans) of phosphorescent paint. All but 240 quarts of the paint were put up by appellant in the specified quart cans, and were combined with the other required products to complete 3,716 kits, which were delivered to and paid for by the Government. After delivery of these kits appellant still had the remaining 240 quarts of Government-furnished phosphorescent paint on hand.

Negotiations between appellant and the Government during 1953 led to the execution of a second contract,

No. 383s-97516, on January 7, 1954 (hereinafter referred to as contract No. 2). In this contract, appellant agreed to furnish the Government 3,688 quarts of phosphorescent paint in one quart cans at a price of $6.17 per quart. This was the exact amount of paint needed to complete contract No. 1 and was paint of the same type of phosphorescent paint called for by contract No. 1.

Contract No. 2, unlike the earlier contract, contained no express words in the schedule, specifications, or elsewhere, stating that "The Government shall furnish to the Contractor for use in connection with this contract, the material set forth below:" followed by a description of any "material." Contract No. 2 did provide, however, as follows:

GOVERNMENT FURNISHED MATERIAL

> This Phosphorescent Paint to be furnished under this contract shall be packaged and marked by the contractor so it may be used, without repacking or remarking, as Component "A" of the Phosphorescent Paint Kits to be furnished by the same contractor under Contract N383s-77428 [No. 1].
>
> Contract N383s-77428 [No. 1] provides that Component "A" (Phosphorescent Paint) shall be supplied by the Army as Government Furnished Material in the amount of 1,911 gallons, which amount is sufficient to produce 7,644 Phosphorescent Paint Kits covered by that contract; however, a quantity of 989 gallons only were available from Army stocks as Government Furnished Material. Procurement of 3,688 quarts (922 gals.) under Contract N383s-97516 [No. 2] was, therefore, necessary to effect completion of Contract N383s-77428 [No. 1].

Notwithstanding the nature of contract No. 2, the standard "Government Furnished Property" clause, which allocated

the risk of loss for such property, was also inserted. Since contract No. 2 was a negotiated contract instead of an advertised one, the risk of loss by fire of the "Government-Furnished Property" was placed upon the Government, see 32 C. F. R. 13.502, but the insertion of this standard clause created the ambiguity which caused the present controversy.

Contract No. 2 also contained a "Disputes" clause, identical to the one in contract No. 1.

Appellant manufactured 1,118 quarts of phosphorescent paint pursuant to contract No. 2, and these 1,118 quarts, subsequently destroyed by fire, became the subject matter out of which the action before us arose. Of the 1,118 quarts, 318 were inspected and accepted by the Government at appellant's plant on April 6, 1954, and 800 were inspected and accepted by the Government at the plant on May 5, 1954. On each occasion, the Government inspector executed a "Material Inspection and Receiving Report," which recited among other things:

> "Government-furnished property.
>
> Material to be used for Contract N383s-7742 (No. 1), by same Contractor for Component "A."

Copies of these reports were given to appellant. Subsequently, the Government paid appellant the purchase price for these 1,118 quarts.

After the Government had accepted the 1,118 quarts, they were kept in appellant's plant. This paint was not mingled with the 240 quarts which appellant had previously received as Government-furnished property under contract No. 1. Appellant did not increase the dollar limit on its inventory insurance to reflect the value of the 1,118 quarts manufactured under contract No. 2.

On May 31, 1954, appellant's plant was destroyed by fire. Included within the property lost were the 240 quarts of paint which were admittedly Government-furnished under contract No. 1 and for which appellant acknowledged liability, and the 1,118 quarts which had been manufactured by the appellant under contract No. 2 and had been accepted by the Government. The appellant, by letter dated June 8, 1954, informed the Government of the loss of the two lots of paint. In the letter, the appellant stated: "The first 60 gal. was material which we had left from Government Furnished Material. The Balance was made for Aviation Supply Office under Contract N383s-77428 [No. 1]."[1]

The Government, in a letter dated August 4, 1954, informed appellant that a determination had been made that appellant was liable for both the 240 quarts and the 1,118 quarts of paint that had been destroyed, as both were Government-furnished property under contract No. 1, under which the risk of loss was to fall upon the contractor. On August 19, 1954, appellant replied. It admitted its liability for the 240 quarts, but requested that the Contracting Officer absolve it of liability for the 1,118 quarts because of the language in the "Government-Furnished Property" provisions of the second contract.

The Contracting Officer, on October 26, 1954, found appellant liable for the 1,118 quarts of paint. The Contracting Officer held: "Government Furnished Property clause in contract N383s-97516 [No. 2] is not applicable to and does not supersede the Government Furnished Property Clause of contract N383s-77428 [No. 1]." He found that

1. At the administrative hearing an official of the appellant testified that the contract number recited in this letter was an unintentional mistake, and that he meant to refer to contract No. 2.

the loss of the paint occurred while it was "in the Contractor's custody pending inclusion as Government Furnished Property in kits being furnished under contract N383s-77428 [No. 1]," and thus appellant was liable for replacement of such material under the provisions of contract No. 1.

Pursuant to the "Disputes" clauses of both contracts, appellant, on November 24, 1954, appealed to the Armed Services Board of Contract Appeals. After conducting a hearing, taking testimony, and receiving briefs from both parties, the Navy Contract Appeals Panel of the Armed Services Board of Contract Appeals, on June 24, 1957, filed its findings of fact, and handed down a decision in which it affirmed the ruling of the Contracting Officer. The Board decided "that at the time of their destruction on 31 May 1954 the 1,118 quarts of paint were at Appellant's risk under the provisions of Contract No. 1." The Board was of the view that "under the circumstances disclosed, Contract No. 2, even if deemed to be ambiguous in some respects, cannot be reasonably interpreted as providing that paint manufactured under Contract No. 2 would ever become subject to the Government-furnished property article of Contract No. 2," but rather that "Contract No. 2, in the light of the conduct of the parties, is to be reasonably construed as providing that paint manufactured under Contract No. 2 shall upon delivery become Government-furnished property under Contract No. 1 and subject, therefore, to the Government-furnished property article of Contract No. 1."

Appellant also attempted, by an amendment to its complaint filed after the hearing, to present to the Board of Contract Appeals a claim for an allowance for the Government's alleged delay in furnishing paint under contract No. 1. It invoked the clause of the contract relating to an equitable adjustment, if requested by the contractor, in

price or date of performance for Government delays in furnishing material. The Board, however, refused to consider this issue, as appellant had failed to raise it either before the Contracting Officer or initially before the Board, and "the case was tried by the parties solely on the question of where the risk lies."

Thereafter, on February 25, 1958, appellant brought the present action in the district court, seeking damages, first, in the amount of $6,898.06 for the Government's alleged failure to deliver Government-furnished paint under contract No. 1, paint which appellant was required to replace after the fire by purchase in the open market, and second, additional damages in the amount of $3,000.00, claimed to have resulted from the Government's alleged delay in delivering Government-furnished paint under contract No. 1. The complaint alleged that the decision of the Armed Services Board of Contract Appeals, adverse to appellant, was "not based on substantial evidence" and "contained errors of law." Later, however, a question arose as to the scope of review in the district court under the Wunderlich Act, 68 Stat. 81 (1954), 41 U. S. C. §§321-22 (1958),[2] for

2. The Wunderlich Act provides as follows:

§1. Limitation on pleading contract-provisions relating to finality; standards of review.

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent (sic) or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§2. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

the Government, on October 7, 1960, moved for an order precluding the taking of testimony by the district court and directing that the scope of review be limited to a consideration of whether the decision of the Board was supported by substantial evidence and was sound in law. The court, in a memorandum opinion dated October 24, 1960, granted the Government's motion and held that the issues before it would be determined solely on the record made before the Board of Contract Appeals.

In its answer the Government had demanded judgment dismissing the complaint. By an order dated July 17, 1961, the district court granted this demand and entered judgment in favor of the Government. In its opinion, reported at 199 F. Supp. 285, the Court divided the controversy into two issues. The first related to the proper interpretation of the contract provisions. This was treated as solely a question of law. The district court held as to this issue that the second contract did not supersede or modify the first contract, but merely implemented it; and that the "Government-Furnished Property" provision of contract No. 2 was not intended to cover the paint to be manufactured by appellant under that contract.

The second issue before the district court, "whether the government accepted the paint and supplied it to the plaintiff for performance of the first contract," was described by the court as a "factual issue." As to this issue, the court found that the Government, by leaving with appellant the paint which appellant had manufactured under contract No. 2 and which the Government had accepted and paid for, furnished it to appellant for performance of contract No. 1. Therefore, the district court agreed with the Board that, under the risk-of-loss provision of Contract No. 1, appellant was responsible for the loss of the

1,118 quarts of paint. Appellant then appealed to this court.

There are two questions before us for decision: (1) whether the district court was correct in deciding the issues before it solely upon the record made at the administrative hearing or whether it should have taken additional testimony in a trial *de novo*, and (2) if the district court was correct in limiting the taking of evidence, whether it was correct in its interpretation of the contract provisions.

The court below was right, at least initially, in considering the interpretation of the contract provisions a question of law for its independent decision under the Wunderlich Act, 68 Stat. 81 (1954), 41 U. S. C. §322 (1958). See *Kaufield Constr. Corp.* v. *United States*, 278 F. 2d 217 (2d Cir. 1960); H. Rep. No. 1380, 83d Cong., 2d Sess. 5 (1954). *But see United States* v. *McKinnon*, 289 F. 2d 908 (9th Cir.) (*per curiam*). On the other hand, when it is necessary to look beyond the four corners of a document to resolve the intention of the parties, the question of the meaning of the contract has often been considered a question of fact. *West* v. *Smith*, 101 U. S. 263, 270 (1879); 4 Williston, Contracts §616 at 660 (3d ed.).

At first blush it may appear paradoxical for appellant to insist that this issue is a "question of law" within the Wunderlich Act, and also insist that it be allowed to present additional evidence on the point in a trial *de novo* before the district court. We realize, however, that the terms "question of fact" and "question of law," may have various meanings in various contexts. Therefore, we can imagine situations in which appellant's argument would be internally consistent. Cf. *Kaufield Constr. Corp.* v. *United States*, *supra*. We must decide whether we are presented with one of those situations.

The law is quite unsettled whether a district court reviewing the administrative ruling of one of the contract disputes boards should grant a trial *de novo* and take testimony, or whether it should limit its review to the record made before the administrative board. The Court of Claims has generally held that a trial *de novo* should be granted. *Valentine and Littleton* v. *United States*, 145 F. Supp. 952 (Ct. Cl. 1956). *Fehlhaber Corp.* v. *United States*, 151 F. Supp. 817 (Ct. Cl.), *cert. denied*, 355 U. S. 877 (1957). The district courts and the courts of appeals, on the other hand, have tended to restrict court review to a review of the administrative record. *United States* v. *McKinnon*, *supra*; *Lowell O. West Lumber Sales* v. *United States*, 270 F. 2d 12 (9th Cir. 1959); *Mann Chemical Labs., Inc.* v. *United States*, 174 F. Supp. 563 (D. Mass. 1958); *L. W. Foster Sportswear, Inc.*, 145 F. Supp. 148 (E. D. Pa. 1956); *United States Nat'l Bank* v. *United States*, 178 F. Supp. 910 (D. Ore. 1959). *But see Blake Constr. Co.* v. *United States*, 296 F. 2d 393, *supra*. Moreover, the legislative history of the Wunderlich Act is inconclusive. See *Valentine and Littleton* v. *United States*, *supra* at 955-57 (Littleton, J., concurring).

We agree with the statement by the Court of Appeals for the District of Columbia Circuit in *Blake Constr. Co.* v. *United States*, *supra* at 397, that "a practical approach to the allocation of functions is the guideline" we should follow, but in so resolving the problem before us we reach the opposite result from the one that court arrived at in *Blake*. Here, the issue on which appellant wants the district court to take additional testimony was squarely presented to the Contracting Officer and to the Board of Contract Appeals. There is nothing to indicate that appellant was precluded from introducing before the administrative

tribunal whatever evidence it wished to present, and appellant does not claim to have any evidence not known of then and discovered afterwards. Moreover, appellant has failed to point out what additional testimony, not presented to the Board, it desires to present to the district court, and it concedes in one part of its brief that the basic facts are not in dispute.

Appellant should have presented all its evidence to the administrative board. If it had done so, the evidence would have been available both to the administrative tribunal and to the district court. Since the parties had proceeded through a full hearing before the Board of Contract Appeals, the district court was quite correct, under the circumstances here presented, in limiting its review to the record made before the administrative board. Cf. *United States* v. *Hamden Co-op. Creamery Co.*, 297 F. 2d 130, 133 (2d Cir. 1961).

Thus we turn to the remaining question before us, whether, on the evidence before it, the court below was correct in its interpretation of the two contracts. We hold that the district court's interpretation was correct. The two paragraphs of contract No. 2 quoted earlier in this opinion make it abundantly clear that it was the Government's intention in entering into that contract to obtain the quantity of phosphorescent paint if needed to complete its obligation under contract No. 1.

Appellant concedes that the Government accepted and paid for the 1,118 quarts of paint that were destroyed. Upon this acceptance these quarts became Government-furnished paint under contract No. 1, not under contract No. 2. A reasonable construction of the two contracts is that contract No. 2 implemented contract No. 1, and that contract No. 1 remained in effect throughout the continu-

ing relationship between the parties. Since contract No. 1 placed the risk of loss upon appellant for "Government-Furnished Property" under that contract, it follows that appellant must bear the loss.

Appellant relies heavily upon the "Government Furnished Property" provisions of contract No. 2, which place the risk of loss on the Government for property to which those provisions apply. These were standard provisions found in all negotiated contracts of this type. It would appear that the parties included these standard provisions without considering exactly how the provisions would affect the relationship between them. It would be an awkward interpretation to infer that the present parties by the inclusion of this standard clause intended that the paint to be manufactured under contract No. 2 *by appellant* was to be *Government furnished* property under that contract.

Appellant's belated contention as to delay by the Government is also without merit.

The district court properly dismissed the complaint.

Judgment affirmed.

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No. 63

In the Supreme Court of the United States

October Term, 1953

Arthur Flaxer & Quirk Wrecking, Inc., Petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Ellis N. Slack,
Special Attorney,
Department of Justice,
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 774

ALLIED PAINT & COLOR WORKS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

This case presents the same basic issue raised in *United States v. Carlo Bianchi*, No. 529, now pending before this Court on writ of certiorari granted on December 17, 1962, *i.e.*, whether a district court (or the Court of Claims) reviewing the administrative ruling of one of the contract dispute boards should grant a trial *de novo* and take testimony or whether it should confine itself to the record made before the administrative tribunal. In petitioning the Court in No. 529, the government, asserting a conflict with various court of appeals decisions, relied upon the Second Circuit's decision in the instant case. Accordingly, we do not oppose grant of the petition

herein. We point out, however, that the record in No. 529 has been printed and that briefing is in progress. The Court may therefore wish to defer action on the instant petition pending its decision on the merits in No. 529.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 63

ALLIED PAINT & COLOR WORKS, INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM FOR PETITIONER IN RESPONSE TO MEMORANDUM OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 774

ALLIED PAINT & COLOR WORKS, INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM FOR PETITIONER IN RESPONSE TO MEMORANDUM OF RESPONDENT

In its memorandum in response to the petition for a writ of certiorari herein, the respondent has conceded the importance of petitioner's claims and the importance of the questions presented in this case, and has stated, "we do not oppose grant of the petition herein". However, respondent then states that the record in No. 529 (*United States v. Carlo Bianchi and Company, Inc.*, certiorari granted on December 17, 1962) has been printed and that "briefing is in progress", and that the "Court may therefore wish to defer action on the petition herein pending its decision on the merits in No. 529."

On February 27, 1963, two days after petitioner's counsel received the foregoing memorandum, he telephoned the office of the Clerk of this Court and learned that No. 529 is tentatively scheduled for argument before the Court during the April 1963 sessions of the Court, during either of the weeks of April 15th or April 22nd.

It is petitioner's position that the writ of certiorari should be granted in this case and the case then set for full briefing and oral argument. Petitioner does not at all agree with respondent's characterization of the questions involved in this case as described by it in the foregoing memorandum,[1] and respectfully refers the Court to the petition herein for a full, fair and complete statement of these questions.

In the interest of a complete submission of the important questions involved in both this case and No. 529, we believe that certiorari should be granted herein and that the argument of No. 529 should be deferred until the October 1963 Term, when both cases should be argued, one following the other.

Respectfully submitted,

ROBERT D. WITTE
Counsel for Petitioner

DANIEL H. GREENBERG
Of Counsel

February 27, 1963

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[1] "*i.e.* whether a district court (or the Court of Claims) reviewing the administrative ruling of one of the contract dispute boards should grant a trial *de novo* and take testimony or whether it should confine itself to the record made before the administrative tribunal." (p. 1, Memorandum For The Respondent.)

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 63

ALLIED PAINT & COLOR WORKS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

This memorandum is filed in response to the Court's request that both parties comment on the questions of reformation of the contract involved in this case.

1. Petitioner brought this action against the United States for damages for an asserted breach of contract arising out of the performance of two contracts with the United States, both of which contained a standard disputes clause. Under the first contract, petitioner was obliged to deliver to the government a specified number of paint kits; the government, for its part, was to furnish petitioner one of the components of the kits, *i.e.*, a sufficient quantity of phosphorescent paint (Pet. App. 2a). That contract, awarded pursuant to an invitation to bid, also provided that peti-

tioner was to bear the risk of loss on the government-furnished property delivered to it (Pet. App. 3a). When the government was unable to deliver all of the necessary phosphorescent paint, the parties negotiated a second contract, whereby petitioner would furnish the additional amount required for completion of the first contract (Pet. App. 3a–4a). The second contract contained no schedule requiring the government to furnish any material or supplies for use on that contract, but it did include a standard clause for negotiated contracts which imposed the risk of loss of government-furnished property upon the United States (Pet. App. 4a–5a).

Petitioner thereupon manufactured 1,118 quarts of the phosphorescent paint, which was inspected and accepted by the government and left with petitioner for use on the first contract (Pet. App. 5a). This paint was subsequently destroyed by a fire at petitioner's plant (Pet. App. 6a). Petitioner replaced the paint by purchases in the open market and made claim for reimbursement (Pet. App. 8a).

The contracting officer denied the claim, finding that the paint, upon its acceptance, constituted government-furnished property covered by the initial contract and that petitioner therefore bore the risk of loss (Pet. App. 6a). Petitioner, pursuant to the disputes clause of its contracts, appealed to a panel of the Armed Services Board of Contract Appeals, which permitted petitioner to introduce all of the evidence it wished to present (Pet. App. 11a). Neither the government nor petitioner requested reformation of either of the contracts. The Board

sustained the contracting officer's findings as against petitioner's contentions (1) that the second contract was intended to supersede or modify the first and (2) that the government had not in fact supplied the paint for use on the first contract (Pet. App. 6a–7a).

Petitioner thereupon brought this suit in the district court under the Tucker Act (28 U.S.C. 1346(a)(2)), alleging that the government failed to deliver the paint which it was obliged to furnish under the first contract (Pet. App. 2a). Petitioner asserted that the decision of the Board was not supported by substantial evidence and was based upon errors of law (App. 5a–6a).[1] Again, neither party requested reformation of either agreement (App. 4a–9a).

After answer, the government moved for an order directing that review be limited to the administrative record (Pet. App. 8a–9a). Petitioner opposed on the ground that the case involved an issue of law (interpretation of the contracts) and that it was entitled to present evidence on the issues of fact related thereto (App. 11a). It did not contend that it had been precluded from presenting evidence to the Board or that it had newly discovered evidence. Indeed, it failed to point out what additional evidence it desired to offer (Pet. App. 12a). The district court, by memorandum opinion, limited review to the administrative record (App. 10a–12a).

In a later opinion (App. 13a–17a, 199 F. Su[illegible] p. 285), the court ruled that the second contract did not supersede or modify the first, and that the standard

[1] "App." references are to the printed Appendix for Appellant filed in the court of appeals.

government-furnished property clause of the second was not intended to cover paint to be manufactured by petitioner under that contract (Pet. App. 9a). The court also sustained, as supported by substantial evidence, the Board's finding that the government, by accepting the paint manufactured under the second contract and leaving it with petitioner, had furnished it to petitioner for performance on the first contract. Accordingly, it ruled that the risk of loss was on petitioner and denied recovery (Pet. App. 9a–10a).

In the court of appeals, shortly after the decision in *Blake Construction Co.* v. *United States*, 296 F. 2d 393 (C.A.D.C.), petitioner contended for the first time that there was an issue of reformation of the contract which justified the taking of additional evidence. The government urged that, since this issue had not been raised administratively or in the district court, it could not be raised for the first time on appeal and that there was, in any event, no issue of reformation involved.

The court of appeals affirmed. It held that the district court had correctly limited review to the administrative record, which had been made on the basis of a full hearing (Pet. App. 10a–12a). It also approved the interpretation of the two contracts adopted by the Board and the district court (Pet. App. 12a–13a). Apparently accepting the government's view that reformation had not been properly raised and was not involved, the court made no mention of that subject (Pet. App. 1a–13a).

2. In seeking review in this Court, petitioner asserted conflicts with the Court of Claims' decision in

Carlo Bianchi and Company, Inc. v. *United States*, 144 Ct. Cl. 500, and with *Blake Construction Company* v. *United States*, 296 F. 2d 393 (C.A.D.C.). Conceding that there was a conflict with the former case, the United States did not oppose grant of the writ but suggested that it might be appropriate to defer action on the petition pending this Court's disposition of the *Bianchi* case.

The issue in *Bianchi* was whether the Wunderlich Act limits the trial court to review of the administrative record in resolving a controversy within the standard disputes clause of a government contract. This Court has now answered that question affirmatively, upholding the practice which has generally prevailed in the district courts and in the courts of appeals and rejecting the practice of the Court of Claims which has permitted trial *de novo*. *United States* v. *Bianchi and Company, Inc.*, Oct. Term, 1962, No. 529, decided June 3, 1963.

In the *Blake Construction* case, *supra*, the District of Columbia Circuit held that a determination which was outside "agency expertise," *i.e.*, whether there were grounds for reformation of a contract, should be made by the district court. The decision distinguished this type of determination from issues as to excessiveness of profits and performance in conformity with contract specifications—issues which the court regarded as appropriate for disposition by the administrative boards.

2. Petitioner's claim that the instant case raises an issue of reformation and comes within the rationale of the *Blake Construction* case was made for the first time in the court of appeals. That circumstance

alone would justify the court of appeals' failure to pass upon the contention. *United States* v. *Tucker Truck Lines*, 344 U.S. 33; *Hormel* v. *Helvering*, 312 U.S. 552. But we do not stand on that point alone. Petitioner's claim that there is now an issue as to reformation is based upon a misuse of that term. It says (Pet. 10) that the district court, which had the problem of interpreting and reconciling contracts 1 and 2, "reformed the contract" by disregarding the import of certain language in the second contract. This is nothing more than an assertion that the three tribunals which have passed upon the meaning of the contracts have misinterpreted them.

The short of the matter is that the action brought in the district court is not one to reform the contracts but, rather, one to recover on the contracts *as written* (App. 4a–6a).[2] At no point has there been a suggestion that the parties mistakenly omitted language from the contracts or inadvertently used words that were not intended to be included. On the contrary, each contended throughout the administrative hearings and the subsequent litigation that the language of the contracts supported its conclusion. The situation has nothing in common with the *Blake Construction* case, in which the administrative board

[2] Petitioner's suggestion that it did not introduce evidence as to the intent of the parties because the Board was without jurisdiction to reform the contract (Pet. 11–12) is contradicted by the record here. The intent of the parties was the only issue before the Board and the evidence introduced there all went to that issue (see Pet. App. 8a). Moreover, petitioner's complaint in the district court did not seek reformation.

found that the written contract failed to contain a clause which the parties meant to insert.

4. The instant case, to be sure, does involve the issue (although petitioner has not raised it in these terms) whether evidence bearing upon a dispute as to the proper interpretation of a contract (or of specifications in a contract) may be presented to the trial court *de novo*, albeit the matter has once been heard (or opportunity to present the evidence has been afforded) in the administrative proceedings. Our view on that question is that there should not be repetitive hearings.

It is obvious, we think, that if boards of contract appeals are to adjudicate questions of fact (as the parties in terms provide when they sign a contract containing the disputes clause), they must necessarily determine, in the first instance, the meaning of the contract. One cannot determine, for example, whether a contractual provision has been satisfied or a specification has been met until one decides what the provision or specification means. Characteristically, questions of interpretation and of performance are inextricably bound together. If the case is one in which the meaning of the agreement may be determined solely by reference to the language within the four corners of the instrument, there is of course no question as to the taking of evidence. Nor is there any difficulty in the way of a subsequent judicial determination of the question whether the agency's interpretation was a permissible one.

But what of the case in which it is necessary or appropriate to resort to extrinsic aids, for example, the case where one party to the contract argues that a crucial term has a special meaning in the trade and that the parties intended this meaning, rather than some other meaning, to control? Should the evidence bearing upon that question be heard *de novo* in the trial court? We think not—and not only because a duplication of the hearing process is a wasteful one, but also because the Wunderlich Act, far from requiring such a result, points in the contrary direction. Under that Act, an administrative determination of fact is conclusive if supported by substantial evidence, while an administrative decision on a question of law is not to be deemed final. 41 U.S.C. 321, 322. When a tribunal resorts to extrinsic aids, it would seem plain, virtually as a matter of definition, that there is a disputed fact to be resolved—evidence relates to facts—and that, at the least, the administrative determination of the precise question to which that evidence is addressed is a factual one.[3] The same point frequently arises in deciding upon the proper alloca-

[3] In *United States* v. *Wunderlich*, 342 U.S. 98, the Court of Claims had based its refusal to give effect to the administrative determination on the ground that the dispute was one of interpretation of a contract and was a question of law not covered by the disputes clause (117 Ct. Cl. 92, 212–214). This Court reversed after the contractor had conceded that the dispute was one of fact and covered by the disputes clause. 342 U.S. at 99. Even where there is no extrinsic evidence necessary to determine the intent of the parties, "there is much to be said for the argument that the 'interpretation' [of a contract] presents a question of fact." *United States* v. *Moorman*, 338 U.S. 457, 462; 3 Williston, *Contracts* (rev. ed., 1936) § 616.

tion of functions as between judge and jury.[4] As this Court stated in *Rankin* v. *Fidelity Trust Co.*, 189 U.S. 242, 252–253:

> * * * Although the construction of written instruments is one for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury. * * *

See, also, *West* v. *Smith*, 101 U.S. 263, 269–270.[5]

We recognize that it has been the settled view of the Court of Claims that it might retry an issue of fact subsidiary to a question of contractual interpretation.[6] But it is not clear that this conflict is a live one. In the first place, the Court of Claims, until this Court's decision in the *Bianchi* case, regarded itself as free to try *de novo any* issue heard in the

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[4] Actually, the role of the administrative tribunal in cases arising under the disputes clause and the Wunderlich Act may be somewhat broader than that of a jury in regard to the interpretation of contractual specifications, drawings and other detailed provisions. See *Salem Products Corp.* v. *United States*, 298 F. 2d 808, 810 (C.A. 2); cf. *Kayfield Const. Corp.* v. *United States*, 278 F. 2d 217 (C.A. 2).

[5] The logic of the argument set forth in the text raises questions as to the correctness of the District of Columbia Circuit's decision in the *Blake Construction* case, *supra*. Whether the parties to that contract inadvertently omitted a provision they meant to include is also a question of fact. However, the *Blake* decision, whatever its merit, is expressly limited to questions involving reformation of contracts—an issue not presented, as we have argued above, in the instant case.

[6] See, *contra*, *Lowell O. West Lumber Sales* v. *United States*, 270 F. 2d 12 (C.A. 9), and *United States* v. *A. J. McKinnon*, 289 F. 2d 966 (C.A. 9).

administrative proceedings. Secondly, a very recent decision of that court indicates that it will re-examine the question which we have discussed immediately above in the light of *Bianchi*. In *Stein Bros. Mfg. Co.* v. *United States*, No. 389–59, decided July 12, 1963, the court stated (slip op., p. 2):

> The ultimate issue in the case, relating to the meaning of the contract specifications, is one of law not of fact * * * [citing cases]; that being so, it may very well be that this court is not precluded by the *Bianchi* decision or the Wunderlich Act (41 U.S.C. §§ 321–322) from considering any evidence bearing on that legal issue, no matter what the Board of Contract Appeals determined or what was in the record before it. But we need not face that issue in the present case since there is another ground on which we can properly consider the new evidence without in any way flouting the Supreme Court's ruling. * * *

Doubtless, the lower courts will have further occasion to consider the reach of the *Bianchi* decision and its application to variant situations. These questions, however, are not in our view ripe for review. The only clear conflict which the instant case presented has been resolved, we submit, by the *Bianchi* decision. For these reasons we believe that the petition herein should be denied.

ARCHIBALD COX,
Solicitor General.

AUGUST 1963.